In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-37

GLADYS T. GEIGER, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum findings of fact and opinion of the Tax Court are unofficially reported at 28 T.C.M. 795. The opinion of the court of appeals (Pet. App. A-1 - A-3) is reported at 440 F. 2d 688.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 1971. The petition for a writ of certiorari was filed on July 6, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Tax Court's holding that petitioner's uncontradicted testimony was insufficient to overcome the presumption of correctness of the Commisioner's disallowance of the claimed deductions, and to sustain her burden of proof.

STATEMENT

The Commissioner disallowed for want of proof all or a portion of each of the business expense and charitable contribution deductions claimed by petitioner in her income tax returns for 1959 through 1961. In the Tax Court, where she sought review of the Commissioner's determination, petitioner did not offer any checks or receipts to establish expenditure of the amounts claimed as deductions; nor did she offer any written evidence to establish the purpose of the claimed expenditures. She merely adduced her own vague and conclusory testimony that all of the deductions listed in her returns were accurate and correct, and the testimony of her accountant that he prepared her 1960 and 1961 returns on the basis of her books and records (not offered in evidence) and other materials submitted to him, but that he did not have personal knowledge of any expenditures claimed to have been made by petitioner. Petitioner's testimony did not match up any specific expense or amount with any specific person, place or purpose. (Pet. App. A-2 - A-3.)

On this record, the Tax Court sustained the Commissioner's determination, and the court of appeals affirmed (Pet. App. A-1 - A-3).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review.

1. Petitioner had the burden not only to overcome the presumption of correctness which attached to the Commissioner's determination that the claimed expenditures were not deductible (*Welch* v. *Helvering*, 290 U.S. 111), but also to establish her entitlement to the claimed deductions. Rule 32, Rules of Practice, United States Tax Court (Rev. 1958, 1965 ed.); *Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593; *White* v. *United States*, 305 U.S. 281, 292; *New Colonial Co.* v. *Helvering*, 292 U.S. 435, 440. Since her accountant had no personal knowledge of any of the expenditures, the Tax Court properly held that his testimony "adds nothing" to petitioner's testimony. It was within the province of the trier of fact to find that the testimony of petitioner, an interested witness, did not overcome the presumption of correctness, since that testimony, although uncontradicted, was unsupported. See, *e.g.*, *Helvering* v. *National Grocery Co.*, 304 U.S. 282, 295.

2. Petitioner has not pointed out, and we are unable to perceive, why the Tax Court's change from a legislative to a constitutional court requires, as petitioner contends (Pet. 11-12), that it no longer accord the presumption of correctness to the commissioner's determinations. It is sufficient to note

with regard to this contention that this is no more than is required in other constitutional courts. See *United States* v. *Rindskopf*, 105 U.S. 418, 422; *United States* v. *Lease*, 346 F. 2d 696, 699 (C.A. 2).

3. Sundry additional constitutional questions sought to be presented do not require discussion. They were neither raised nor considered below, and are asserted without supporting argument in the petition. However, in connection with petitioner's claim (Pet. 6) that taxpayers now enjoy a constitutional right to jury trials in the Tax Court, we note that the right of a taxpayer to such trials is derived from congressional enactments rather than the Seventh Amendment (see *Wickwire* v. *Reinecke*, 275 U.S. 101, 105-106; *Phillips* v. *Commissioner*, 283 U.S. 589, 599 and n. 9), and that Congress has not seen fit to provide for jury trials in the Tax Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

WILLIAM MASSAR,
WILLIAM M. BROWN,
Attorneys.

AUGUST 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 ◄ 440356 66